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11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
13  
14

15 **ADAM RICHARDS, et al.,**  
16  
Plaintiffs,  
17  
v.  
18 **GAVIN NEWSOM, in his official**  
19 **capacity as Governor of California, et**  
20 **al.,**  
Defendants.  
21  
22

Case No.: 8:23-cv-02413 JVS (KESx)  
**DEFENDANTS' SUPPLEMENTAL**  
**BRIEF IN RESPONSE TO THE**  
**COURT'S ORDER OF JANUARY**  
**17, 2024**

Date: January 16, 2024  
Time: 9:00 a.m.  
Courtroom: 10C  
Judge: The Honorable James V. Selna  
Action Filed: 12/19/2023

1 The Court has invited Defendants to brief the applicability of California Penal  
 2 Code section 26806 to (1) “kitchen table firearm transactions” (or, transactions at  
 3 in-home licensed firearms dealers); and (2) “gun show transactions.” (ECF No.  
 4 25.) Defendants do not interpret section 26806 to apply to gun shows, and thus will  
 5 not further address that issue here.<sup>1</sup> However, section 26806 does apply to in-home  
 6 dealers, and the application of the statute to in-home dealers—one of a host of  
 7 regulations on the commercial sale of arms that apply to storefront and in-home  
 8 dealers alike—does not alter the analysis as to why the Court should deny the  
 9 preliminary injunction.

10 **I. SECTION 26806 IS ONE OF A HOST OF REGULATIONS APPLICABLE TO A**  
 11 **CLOSELY REGULATED INDUSTRY THAT APPLY TO IN-HOME AND**  
 12 **STOREFRONT FIREARMS DEALERS ALIKE**

13 Throughout Penal Code Title 4, Division 6, Chapter 2 (where section 26806  
 14 appears), “premises” is tied to “the building designated in the license.” *See* Cal.  
 15 Pen. Code § 16810. Like all regulations on licensed firearms dealers, section 26806  
 16 applies to dealers who use their homes as their “business premises” to conduct  
 17 firearms sales and transactions. *See id.* §§ 16810, 26805. Indeed, Plaintiffs do not  
 18 appear to dispute that section 26806, by its plain terms, applies to all firearm  
 19 dealers, whether storefront or in-home, just as they do not contend that in-home  
 20 dealers are exempt from the many other regulations on firearm dealers.

21 Section 26806 is thus just one of a host of regulations that apply to licensed in-  
 22 home and storefront firearms dealers alike. Firearms dealers undoubtedly  
 23 participate in a closely regulated industry subject to extensive federal, state, and  
 24 local regulations and licensing schemes that govern nearly all aspects of firearms  
 25 sales, storage, and transactions. *See* Defs.’ Opp’n 17-18 (ECF No. 20). This array  
 26 of stringent regulations applies to anyone who performs firearms transactions on  
 27 their “licensed business premises,” without making a distinction between storefront

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28 <sup>1</sup> Since section 26806 does not apply to gun shows, issuing a preliminary  
 injunction with respect to those settings would be inappropriate.

1 or in-home dealers. *See* Cal. Pen. Code § 16810. All dealer applicants must  
2 provide the same information to become licensed (*id.* § 26700; 11 C.C.R. § 4018),  
3 and the definition of “licensed gun dealer” also does not differentiate between in-  
4 home and storefront operations (Cal. Penal Code § 16790; 11 C.C.R. § 4017(d)).  
5 Once in operation, both storefront and in-home dealers must comply with the same  
6 stringent regulations concerning, to give examples, secure storage of firearms (*e.g.*,  
7 Cal. Penal Code §§ 17110, 26890, 26892), warrantless inspections of the premises  
8 from government officials (*e.g.*, *id.* § 26900; 11 C.C.R. § 4022(a); 18 U.S.C.  
9 § 923(c)), the collection and reporting of information on firearms transactions (*e.g.*,  
10 Cal. Penal Code §§ 26840, 26845, 26905, 26910, 28160, 28175, 28180, 28205,  
11 28210, 28215), and conveying various notifications and warning signs and labels to  
12 patrons (*e.g.*, *id.* §§ 23640, 26835, 26865, 26875, 34205). *See also* Opp’n 17-18.  
13 Section 26806 fits squarely within this scheme that closely regulates the sale of  
14 arms by both storefront and in-home dealers. Just as the fact that some dealers  
15 choose to operate a business in their homes does not diminish the risk of unlawful  
16 transactions or the benefit of surveillance as a law enforcement tool, that fact also  
17 does not exempt them from generally applicable firearms regulations.

18 The firearm industry is not unique in this respect. In-home operations in other  
19 highly regulated industries are also subject to close government regulation and  
20 inspection. In-home day cares are subject to extensive regulation and inspection  
21 mandates. Cal. Health & Safety Code ch. 3.6 (§§ 1597.30-1597.65); Cal. Code  
22 Regs. tit. 22, div. 12, ch. 3 (§§ 102351.1-102426). And those conducting  
23 commercial cannabis activity may use a private residence as their licensed premises  
24 under certain circumstances, but regardless of where they choose to do business are  
25 subject to the same regulatory requirements. Cal. Code Regs. tit. 4, § 15000.3(c).

26 Nor is the firearm industry the only highly-regulated industry for which  
27 surveillance is required. Federal law requires banks to maintain surveillance  
28 cameras. *See* 12 C.F.R. § 326.3. Various types of gambling establishments,

1 including card rooms, are also subject to surveillance requirements. Cal. Code  
 2 Regs. tit. 4, §§ 12372, 12396. And in the commercial cannabis industry, “[e]ach  
 3 licensed premises shall have a digital video surveillance system” that “record[s]  
 4 continuously 24 hours per day”; can “effectively and clearly record” specified  
 5 areas, including “[e]ntrances and exits to the licensed premises”; and is subject to  
 6 government inspection. *Id.* § 15044. In fact, these surveillance requirements for  
 7 commercial cannabis can apply to in-home licensees. *Id.* § 15000.3(c).

8 In summary, section 26806’s application to in-home firearms dealers is not  
 9 unique. It is merely one among a multitude of regulations that apply to in-home  
 10 and storefront dealers alike, similar to laws in other highly regulated industries.

## 11 **II. THE APPLICATION OF SECTION 26806 TO IN-HOME FIREARMS DEALERS** 12 **DOES NOT CHANGE THE ANALYSIS AS TO WHY THE COURT SHOULD** 13 **DENY THE PRELIMINARY INJUNCTION**

### 14 **A. Plaintiffs Have Not Based Their Preliminary Injunction Request** 15 **on an As-Applied Challenge to Section 26806**

16 As an initial matter, Plaintiffs have not sought a preliminary injunction against  
 17 section 26806’s application to any particular Plaintiff or to just in-home firearm  
 18 dealers. Instead, Plaintiffs have moved for a broad preliminary injunction against  
 19 the entirety of the statute on its face. *See* TRO and PI App. (ECF No. 11) at p. 1;  
 20 Pls.’ [Proposed] Order (ECF No. 11-13). Although their Complaint could be read  
 21 to challenge the law both facially and as applied to the Plaintiffs, it ultimately seeks  
 22 a “preliminary and permanent injunction” against section 26806 entirely on its face,  
 23 and not as applied to just Plaintiffs themselves. Compl. p. 114, lns. 20-23.

24 A facial challenge is “a claim that the law or policy at issue is unconstitutional  
 25 in all its applications.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). Facial  
 26 challenges are “disfavored” for several reasons including that they “run contrary to  
 27 the fundamental principle of judicial restraint that courts should [not] ... formulate a  
 28 rule of constitutional law broader than is required by the precise facts to which it is  
 to be applied.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442,

1 450 (2008) (cleaned up). By contrast, an as-applied challenge contends that the law  
2 is unconstitutional “as applied to the litigant’s particular ... activity, even though the  
3 law may be capable of valid application to others.” *Foti v. City of Menlo Park*, 146  
4 F.3d 629, 635 (9th Cir. 1998). An as-applied challenge “requires an analysis of the  
5 facts of a particular case to determine whether the application of a statute, even one  
6 constitutional on its face, deprived the individual to whom it was applied of a  
7 protected right.” *Calvary Chapel Bible Fellowship v. County of Riverside*, 2017  
8 WL 6883866, at \*15 (C.D. Cal. Aug. 18, 2017) (cleaned up).

9 The Court should reject any attempt to convert the preliminary injunction  
10 request from a disfavored facial challenge to an as-applied challenge. The motion  
11 and supporting memorandum make no argument demonstrating that section 26806  
12 is likely to violate the constitutional rights of any particular Plaintiff under their  
13 own particular factual circumstances. Nor have Defendants had sufficient  
14 opportunity to test the scant evidence that has been presented and contest the notion  
15 that section 26806 is unconstitutional as to the particular in-home dealers that are  
16 party to this lawsuit. For example, Defendants have not had occasion to evaluate  
17 whether any of the in-home dealer plaintiffs in particular have met standing,  
18 ripeness, or other requirements for an as-applied challenge, or whether the law  
19 imposes irreparable harm particular to them. This lack of argumentation and  
20 evidence “makes it impossible for the Court to determine whether the [law], *as*  
21 *applied to Plaintiffs*, is unconstitutional.” *Cal. Rifle & Pistol Ass’n v. City of*  
22 *Glendale*, 644 F. Supp. 3d 610, 621 & n.7 (C.D. Cal. 2022).

23 **B. Plaintiffs Remain Unlikely to Succeed on the Merits of Their**  
24 **Claims, Including as They Pertain to In-Home Firearms Dealers**

25 **1. First Amendment Claim**

26 As Defendants have explained, section 26806 has no objective chilling effect  
27 on the exercise of First Amendment rights, whether at a storefront or in-home  
28 firearms dealer. Opp’n 4-5. Plaintiffs do not contend (nor could they) that the

1 law's alleged effect would be any different for in-home dealers than for storefronts.  
 2 Indeed, Plaintiffs focus their "chilling" claim on "gun stores" that are open to the  
 3 public. *See* Pls.' Mem. 4-6 (ECF No. 11-1) (referencing "gun stores" four separate  
 4 times).

5 Similarly, Plaintiffs' assertion that the required surveillance "will discourage  
 6 and undermine the free association of people for fear of government monitoring,  
 7 publication, or retribution," Mem. 4, is objectively unreasonable, regardless of  
 8 where it occurs. Section 26806 does not target, regulate, or punish any sort of  
 9 speech or association, and it contains stringent limitations on the release or use of  
 10 the recordings. Those provisions apply equally to storefronts and in-home dealers,  
 11 as do the longstanding requirements for recording and tracking dealer and purchaser  
 12 identifying information for firearms transactions. *See* Opp'n 4-5. And these and  
 13 other provisions also defeat Plaintiffs' claim of any right to anonymity in the  
 14 highly-regulated firearms industry, regardless of whether a transaction takes place  
 15 at a storefront or in-home dealer. Opp'n 6, 13.

16 Plaintiffs' remaining First Amendment arguments are not particular to in-  
 17 home dealers, and in any event fail. Plaintiffs' deficient claim of viewpoint  
 18 discrimination concerns regulation in the firearm industry as a whole, not  
 19 specifically to in-home dealers. *Id.* at 6. And Plaintiffs' "compelled speech"  
 20 challenge to section 26806(c)'s notice requirement concerns all firearm dealers, not  
 21 just those in-home, and, in any event, fails in light of binding precedent. *Id.* at 7;  
 22 *see also Md. Shall Issue, Inc. v. Anne Arundel County Maryland*, \_\_ F.4th \_\_, 2024  
 23 WL 236282 (4th Cir. Jan. 23, 2024).

## 24 **2. Second Amendment Claim**

25 The application of section 26806 to in-home dealers does not change the  
 26 analysis of Plaintiffs' Second Amendment claim, which fails under the test  
 27 prescribed by *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111  
 28 (2022), for the same reasons that such a claim as to storefront dealers fails. At

1 *Bruen*’s first step, the analysis for in-home and storefront dealers remains the same.  
2 Both engage in the commercial sale of arms, which falls outside the Second  
3 Amendment’s plain text. Opp’n 8-12. Plaintiffs’ proposed course of conduct is  
4 engaging in firearms transactions without audio-visual recording; but the Second  
5 Amendment says nothing about a particular commercial sales experience,  
6 regardless as to whether it occurs at a store or in one’s home. Nor have Plaintiffs  
7 demonstrated that requiring surveillance at in-home dealers in particular is likely to  
8 “meaningfully constrain[]” individuals’ ability to acquire and possess firearms or  
9 otherwise exercise their Second Amendment rights. *See Teixeira v. County of*  
10 *Alameda*, 873 F.3d 670, 677-80 (9th Cir. 2017) (en banc); *Gazzola v. Hochul*, 88  
11 F.4th 186, 195-99 (2d Cir. 2023). Individuals in California can “keep and bear  
12 Arms” just as much after section 26806’s enactment as before.

13 In addition, any allegation that section 26806’s surveillance requirements  
14 would objectively “chill” firearm purchases from in-home dealers in a unique or  
15 particular way has no merit. *See* Opp’n 12-13. Reasonable prospective purchasers  
16 know that in-home dealers are subject to the same regulatory scheme as are  
17 storefront dealers. And information relating to the purchase of firearms—whether  
18 from a storefront or in-home dealer—has long been subject to public disclosure. *Id.*

19 Even under *Bruen*’s second step, the analysis is the same for storefront or in-  
20 home dealers. Following the requisite “more nuanced approach” to the history-and-  
21 tradition analysis for laws reflecting “unprecedented societal concerns or dramatic  
22 technological changes,” *Bruen*, 142 S. Ct. at 2123-33, section 26806 fits squarely  
23 within the well-established tradition of regulating the commercial sale of firearms  
24 to promote public safety and security, regardless as to whether sales occur in-home  
25 or elsewhere. *See* Opp’n 14-16. The historical laws Defendants identified applied  
26 across the board to all sellers, keepers, and dealers participating in the firearms  
27 trade; none of them made any distinction between in-home and storefront dealers;  
28 and none carved out exemptions for in-home operations. *Id.*



### 3. Fourth Amendment Claim

Plaintiffs' Fourth Amendment claim similarly fails to differentiate between storefront and in-home dealers. Instead, Plaintiffs argue that, across the board, section 26806 constitutes "a forbidden general warrant"; an "unwarranted physical intrusion onto an individual's property"; and a violation of "Plaintiffs' reasonable expectations of privacy." Mem. 10-11. But Plaintiffs are wrong. There is no dispute that the firearms industry—storefront and in-home operations alike—is highly regulated, nor that warrantless inspections of highly regulated businesses comport with the Fourth Amendment. *See* Opp'n 16-19.

Plaintiffs appear to contend that there is a heightened expectation of privacy for in-home dealers that should change the analysis. But Plaintiffs have pointed to no authority to support that proposition. Existing authority makes clear that the principle applies equally to all dealers, regardless of where they choose to operate their business: "When a dealer chooses to engage in this pervasively regulated business . . . , he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *United States v. Biswell*, 406 U.S. 311, 316 (1972). Thus, in-home dealers—who *choose* to operate their businesses from their homes—are appropriately subject to the same slate of generally applicable regulations, including section 26806. Applying regulations equally to in-home businesses is not particular to the firearms industry, and Plaintiffs do not claim that the State lacks authority to conduct compliance inspections, nor could they under binding law. And, in any event, section 26806(b)'s protections ensure that the government cannot access the recordings—whether for in-home or storefront dealers—except in limited circumstances: pursuant to a warrant, or as part of an administrative search for which no warrant is otherwise required, both of which comport with the Fourth Amendment. *See Verdun v. City of San Diego*, 51 F.4th 1033, 1039 (9th Cir. 2022); *Killgore v. City of S. El Monte*, 3 F.4th 1186, 1189 (9th Cir. 2021).



#### 4. Remaining Claims

Section 26806's application to in-home dealers would not save Plaintiffs' Equal Protection claim, as it relies on their First Amendment claim and cannot be supported by a "class-of-one" theory. Opp'n 19. And their state claim fails under the Eleventh Amendment regardless to whom the law applies. *Id.* at 19-20.

#### C. The Remaining Factors Continue to Weigh Against a Preliminary Injunction of Section 26806, Even as Applied to In-Home Dealers

Despite having more than a year to prepare a record, Plaintiffs have identified no irreparable harm sufficient for a preliminary injunction, Opp'n 21, let alone irreparable harm that is specific and particularized to in-home firearms dealers. Their purely speculative contentions that section 26806 might chill or burden constitutional rights generally, or at in-home dealers specifically, is insufficient to meet this factor. Nor do Plaintiffs present evidence that installing the surveillance systems at in-home dealers is cost-prohibitive or logistically unfeasible.<sup>2</sup> This is especially true given that section 26806 is just another of a host of regulations on the sale of arms (many of which pose some burden) that in-home dealers must abide by, none of which Plaintiffs object to here.

In any event, any harm in-home dealers might suffer—for example, having to purchase and install surveillance systems—is far outweighed by the harm to the public if section 26806 were enjoined. Opp'n 22. Section 26806's requirement of enhanced security assists law enforcement in preventing and prosecuting firearms trafficking, thefts, straw purchases and other deadly gun crimes, which can stem from the transactions at in-home dealers just as from storefront dealers. Enjoining section 26806 would remove a law enforcement tool to prevent gun crimes and save lives. Plaintiffs fail to present any evidence demonstrating otherwise.

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<sup>2</sup> One in-home dealer plaintiff, who conducts business in a "separate structure" apart from his actual house, makes no such contention, Richards Decl. ¶ 6, and another merely postulates that he "*may* be force[d] to give up my business," Vandermeulen Decl. ¶ 12 (emphasis added).

1 Dated: January 24, 2024

Respectfully submitted,

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12 SA2023306691

**CERTIFICATE OF COMPLIANCE**

The undersigned, counsel of record for Defendants Governor Gavin Newsom and Attorney General Rob Bonta, in their official capacities, certifies that this brief complies with the length requirement set forth in the Court's order of January 17, 2024 (ECF No. 25).

Dated: January 24, 2024

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 24, 2024, I electronically filed the foregoing document and any attachments thereto with the Clerk of the Court by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 24, 2024                      /s/ Todd Grabarsky  
TODD GRABARSKY